

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHANNON L. AVERY,

Plaintiff

v.

J. MILTON,

Defendant

Case No.: 2:20-cv-01843-APG-EJY

**Order Accepting Report and
Recommendation, Denying Motions as
Moot, and Closing Case**

[ECF Nos. 3, 9, 10, 13]

On December 21, 2020, Magistrate Judge Youchah recommended that I dismiss plaintiff Shannon Avery's claims under 42 U.S.C. § 1983 because his claims are properly pursued in a habeas petition under 28 U.S.C. § 2241. Avery did not file an objection. Thus, I am not obligated to conduct a de novo review of the report and recommendation. 28 U.S.C. § 636(b)(1) (requiring district courts to "make a de novo determination of those portions of the report or specified proposed findings to which objection is made"); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) ("the district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise" (emphasis in original)).

I accept Judge Youchah's recommendation, with the following modifications. Dismissal is without prejudice to Avery seeking relief under 28 U.S.C. § 2241 (to the extent he is challenging the fact of his pre-trial custody on state charges) or under 28 U.S.C. § 2254 (if he is in custody based on a state court judgment). It is not entirely clear from Avery's complaint whether he has been convicted, but he states in his motion to dismiss that he pleaded guilty, although he expresses a desire to withdraw that plea. ECF No. 3 at 7. To the extent Avery is seeking damages for alleged constitutional violations, dismissal is without prejudice to him

1 refiling his claims in a new lawsuit should his criminal conviction later be invalidated. Because
2 it appears from his allegations that his § 1983 claims would necessarily imply the invalidity of
3 his conviction, those claims would presently be barred by *Heck v. Humphrey*, 512 U.S. 477, 487
4 (1994) and *Whitaker v. Garcetti*, 486 F.3d 572, 584 (9th Cir. 2007).

5 I THEREFORE ORDER that Magistrate Judge Youchah's report and recommendation
6 (**ECF No. 13**) is **accepted**, with the modification that plaintiff Shannon Avery's complaint (ECF
7 No. 1-1) is DISMISSED without prejudice to him pursuing relief under 28 U.S.C. § 2241, 28
8 U.S.C. § 2254, or upon invalidation of his conviction, whichever is appropriate under the
9 circumstances.

10 I FURTHER ORDER that plaintiff Shannon Avery's motions to dismiss (**ECF No. 3**), to
11 compel (**ECF No. 9**) and for relief (**ECF No. 10**) are **DENIED** as moot.

12 I FURTHER ORDER the clerk of court to close this case.

13 DATED this 2nd day of February, 2021.

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16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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